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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re G.H., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B288674 (Super. Ct. No. 2016041542) (Ventura County)
THE PEOPLE, Plaintiff and Respondent, v. G.H., Defendant and Appellant.	

G.H. appeals from the judgment after the juvenile court declared him a ward of the court. (Welf. & Inst. Code, §§ 602, 800, subd. (a).) The court found true allegations that G.H. committed assault with a firearm (Pen. Code, § 245, subd. (a)(2)) and personally used a firearm to commit his crime (Pen. Code, § 12022.5, subd. (a)). It ordered him committed to the Division of Juvenile Justice (DJJ) for a maximum term of nine years six months.

G.H. contends: (1) the prosecution presented insufficient evidence he committed assault with a firearm, and (2) the court abused its discretion when it ordered him committed to the DJJ. We affirm the order of wardship, vacate the commitment order, and remand.

FACTUAL AND PROCEDURAL HISTORY

In August 2015, W.B. and K.S. were riding a motorcycle when a group of young men crossed in front of them. K.S. told W.B. that the men had harassed her. W.B. told them to "quit fucking with [his] girlfriend."

The next morning, K.S. woke W.B. and told him a man was asking for him by the front gate of their home. W.B. walked outside and saw G.H. standing outside the gate. G.H. yelled at W.B. He then pulled out a pistol and fired several gunshots. W.B. was unarmed and did not return fire.

W.B. ran behind his pickup truck. When the gunshots stopped, he tried to make his way inside to call 911. G.H. then fired a second series of shots. W.B. again ducked behind the truck. He heard bullets pass over him. The bullets damaged the truck's front bumper and a light on its roof.

W.B. called 911. He said "two Mexicans on bicycles" had shot at his house. He described one of the shooters as a "short little Mexican with a bald head," but could not describe the other. W.B. said he had not previously seen the shooter he described.

Deputy Craig Hennes responded to the scene. W.B. told the deputy that the shooter was the same person who harassed K.S. the day before. He described him as a Hispanic male in his early 20's, wearing a white shirt and plaid shorts, and riding a bicycle.

Deputy Hennes saw G.H. nearby. He matched the description W.B. provided. The deputy detained him. About an hour later, deputies conducted a field lineup with G.H. and four other individuals. W.B. was 70-percent sure G.H. had shot at him.

A field technician took gunshot residue samples from G.H.'s hands. His right hand had "one characteristic particle and two consistent particles of gunshot residue." His left had "three characteristic particles and many consistent particles of gunshot residue." A criminalist opined that G.H. "may have discharged a firearm, been [in] the vicinity of the discharge of a firearm, or touched a surface with gunshot residue on it."

Deputy Hennes recovered a five-chamber, .38-caliber revolver near the house where he detained G.H. One chamber contained a live cartridge, two chambers contained discharged cartridge casings, and two chambers were empty.

Field technicians recovered three bullet fragments from underneath W.B.'s pickup. All three fragments contained lead. The pickup showed two possible bullet strikes on the front bumper. At the station, a detective recovered a discharged .38-caliber cartridge from G.H.'s shoe.

Forensic scientist Song Wicks opined that the cartridge found in G.H.'s shoe had been fired from the revolver Deputy Hennes recovered. The comparisons of the two discharged cartridge casings were inconclusive. The bullet fragments recovered outside W.B.'s residence were unsuitable for comparison.

Some time later, Wicks tested the mark from atop W.B.'s pickup. The mark tested positive for lead. Wicks opined that the mark "may have been caused by a bullet" fired from

either the front or back of the truck. The mark could also have been caused "by some other object containing lead."

At the adjudication hearing, W.B.'s 12-year-old neighbor testified that he heard W.B. yell "Just shut the fuck up!" on the morning of the shooting. A few seconds later he heard two or three gunshots.

Another witness testified that he heard four gunshots. He went outside and saw a "short Mexican boy" back away from W.B.'s gate while holding his hands out to the side. The boy said, "He's shooting at me!" The witness then heard three more gunshots coming from the direction of W.B.'s house.

A witness who lived a block away from W.B. testified that he heard two volleys of shots from two different guns on the morning of the shooting.

The juvenile court found true allegations that G.H. assaulted W.B. with a firearm and personally used a firearm. At the disposition hearing, the probation officer recommended that the court order G.H. committed to DJJ custody based on the seriousness of his offense, his gang involvement, his potential risk to the community, and his extensive juvenile record. Over the years, G.H.'s criminal behavior escalated from vandalism to possession of a firearm to resisting a peace officer to assault. He had been on probation for over four years. He violated probation and absconded from electronic monitoring several times. While on probation, he was offered individual therapy, alcohol and drug counseling, anger management, and tutoring, but he failed to take advantage of these services. His performance was "dismal."

In contrast, G.H. showed "satisfactory" behavior while in custody. Though he accrued a total of 24 adverse incident reports during his stints in juvenile hall, G.H. also

earned his GED and high school diploma. He made the honor roll 18 times, successfully participated in music therapy and sports, and earned special visits for good behavior. He showed progress during therapy sessions. The probation report concludes that an additional three to five years in custody would "allow him to continue rehabilitative services and transform his aberrant behavior." The report did not identify which DJJ rehabilitative services would benefit G.H.

G.H. opposed DJJ commitment. He argued there was no evidence the DJJ would be of probable benefit to him. He also argued there were less restrictive alternatives, such as probation and electronic monitoring, that would be effective.

The juvenile court was "not persuaded" that it should release G.H. on probation because of his prior failures. G.H. had ongoing episodes of violence, probation violations, and failures on electronic monitoring. He was "unable to control . . . impulses that drive [him] in a direction away from where [he] need[s] to go." The court was likewise not convinced G.H. could be rehabilitated in a local setting, but was "fully satisfied that [G.H.'s] mental and physical condition and qualifications [were] such as to render it probable that he [would] benefit from the reformatory, educational, disciplin[ary,] and other treatment provided" by the DJJ.

DISCUSSION

Sufficiency of the evidence

G.H. contends the prosecution presented insufficient evidence that he committed assault with a firearm. We conclude otherwise.

We will uphold the juvenile court's determination that G.H. assaulted W.B. with a firearm if supported by

substantial evidence. (*In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1162.) Our task is to "review[] the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which [the court] could find [G.H.] guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) We draw all reasonable inferences in favor of the prosecution (*People v. Brooks* (2017) 3 Cal.5th 1, 57), and resolve neither credibility issues nor evidentiary conflicts (*People v. Maury* (2003) 30 Cal.4th 342, 403 (*Maury*)). We will not reverse the court's judgment unless it "clearly appear[s] that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Substantial evidence supports the juvenile court's determination that G.H. committed assault with a firearm. W.B. told police that a person shot at him. About an hour later, he identified G.H. as that person. W.B.'s testimony, without more, is sufficient evidence that G.H. assaulted him with a firearm. (*People v. Boyer* (2006) 38 Cal.4th 412, 480 [identification by a single witness sufficient to prove defendant's identity]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 [testimony of single witness sufficient to support a conviction].)

G.H. counters that W.B.'s accounts of the assault were "replete with inconsistencies and discrepancies," rendering them unbelievable. But the juvenile court found W.B. credible, and this court cannot ignore that determination. (*Maury*, *supra*, 30 Cal.4th at p. 403.)

Moreover, W.B.'s testimony was not "so improbable as to be incredible," as G.H. claims. (*People v. Headlee* (1941) 18 Cal.2d 266, 267.) "To be improbable on its face the evidence must

assert that something has occurred that . . . does not seem possible could have occurred under the circumstances disclosed." (*Ibid.*) That "improbability must be apparent; evidence [that] is unusual or inconsistent is not necessarily improbable." (*Ibid.*)

Here, W.B.'s version of events was not improbable on its face because significant forensic evidence corroborated it. Field technicians recovered three bullet fragments from underneath W.B.'s pickup. Each fragment contained lead. W.B.'s pickup truck had two potential bullet strikes on the bumper and another on top of the cab. The strike on top of the cab contained lead.

Additionally, Deputy Hennes found a revolver where he detained G.H. Another deputy found a spent cartridge in G.H.'s shoe that had been fired from the revolver. And G.H. had gunshot residue on his hands. Such corroboration negates G.H.'s claim that it does not seem possible the assault could have occurred under the circumstances disclosed. (*People v. Rosa* (1935) 10 Cal.App.2d 668, 670-671; see also *People v. Brown* (1989) 212 Cal.App.3d 1409, 1421 [testimony and forensic evidence sufficient to uphold assault with a firearm conviction], disapproved on another ground by *People v. Hayes* (1990) 52 Cal.3d 577, 628, fn. 10.)

G.H. also claims that the prosecution presented insufficient evidence that he did not engage in self-defense. (See *People v. Adrian* (1982) 135 Cal.App.3d 335, 340-341 [prosecution has burden to disprove a defendant's claim of self-defense].) He misconstrues our standard of review. Simply because there was evidence that G.H. *may* have acted in self-defense does not mean that the juvenile court erred when it determined otherwise. So long as there is substantial evidence in support of the court's

findings, "that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*People v. Robillard* (1960) 55 Cal.2d 88, 93, overruled on another point by *People v. Satchell* (1971) 6 Cal.3d 28, 35.) Here, the court determined that W.B.'s testimony was entitled to greater weight than that of other witnesses. We cannot now substitute a contrary finding for that determination. (*People v. Duncan* (2008) 160 Cal.App.4th 1014, 1018.)

DJJ commitment

G.H. contends the juvenile court abused its discretion when it ordered him committed to the DJJ because there was not substantial evidence that the commitment would be of probable benefit or that less restrictive alternatives would be ineffective or inappropriate. We agree with the first of these contentions, and do not reach the second.

We review the juvenile court's order committing G.H. to DJJ custody for abuse of discretion. (*In re Carlos J.* (2018) 22 Cal.App.5th 1, 5 (*Carlos J.*).) The court abused its discretion if the findings critical to its decision lack factual support in the record. (*Ibid.*) Thus, to uphold G.H.'s DJJ commitment, there must be substantial evidence in the record that DJJ commitment would be of probable benefit to G.H. and that less restrictive alternatives would be ineffective or inappropriate. (*Id.* at p. 6.)

Carlos J., *supra*, 22 Cal.App.5th 1 is instructive. In *Carlos J.*, the minor fired five or six shots at the victim during a gang-related shooting. (*Id.* at p. 4.) A psychologist recommended probation camp or a local program that would provide therapy for the minor, but the probation department recommended DJJ commitment so "'his educational, therapeutic, and emotional issues [could] be addressed in a secured facility.'" (*Id.* at pp. 8-9.)

The juvenile court could not "'get over the seriousness of the [minor's] offense'" and ordered him committed to the DJJ. (*Id.* at p. 9.) It found "'that the mental and physical condition and qualifications of this youth render it probable that [he] will benefit from the reformatory, disciplin[ary,] or other treatment provided by the [DJJ].'" (*Ibid.*)

The Court of Appeal vacated the commitment order because of insufficient evidence that the commitment would benefit to the minor. (*Carlos J.*, *supra*, 22 Cal.App.5th at p. 11.) Though the juvenile court was aware of the minor's mental health needs, it had no information regarding the mental health services the DJJ could provide. (*Ibid.*) The court also had no information about gang intervention services offered at the DJJ. (*Ibid.*) Without that information, there was no evidence that DJJ commitment would be of probable benefit. (*Id.* at pp. 11-12.)

The same evidentiary void exists here. The probation officer recommended DJJ commitment based on: (1) the seriousness of G.H.'s offense, his gang involvement, the potential risk to the community, and his extensive juvenile record; (2) G.H.'s failure to take advantage of services while on probation; and (3) the progress he showed with services while in custody at juvenile hall. The court agreed that DJJ commitment would benefit G.H. But that is not enough. The court cited no specific DJJ programs that could benefit G.H. (*Carlos J.*, *supra*, 22 Cal.App.5th at p. 10.) And "[t]he probation officer's unexplained and unsupported assertion of possible benefit is not evidence . . . from which the . . . court could make an informed assessment of the likelihood a [DJJ] placement would be of benefit." (*Ibid.*)

"[J]udicial review by this court[] requires some concrete evidence in the record about relevant programs at the

[DJJ]." (*Carlos J.*, *supra*, 22 Cal.App.5th at p. 12, italics omitted.) For example, "[w]here a minor has particular needs, the probation department should . . . include *brief* descriptions of the relevant [DJJ] programs to address those needs." (*Ibid.*, original italics.) "Otherwise, this court's review for substantial evidence is an empty exercise." (*Ibid.*)

That the juvenile court had previously tried less restrictive placements does not change our determination. The law requires both that a DJJ commitment be of probable benefit *and* that less restrictive alternatives be ineffective. (*Carlos J.*, *supra*, 22 Cal.App.5th at p. 6.) Evidence of the latter is not a substitute for the former.

We accordingly vacate the juvenile court's commitment order, and remand for a new disposition hearing. At the hearing, the court has broad discretion to order DJJ commitment or commitment to a local detention or treatment facility. (*In re W.B.* (2012) 55 Cal.4th 30, 45; see Welf & Inst. Code, § 730.) The court is to make its decision based on the facts as they exist at the time of the new disposition hearing. (See *In re Ashly F.* (2014) 225 Cal.App.4th 803, 811.) We express no opinion on whether DJJ commitment would be in G.H.'s best interests.

DISPOSITION

The juvenile court's order of wardship is affirmed. The order committing G.H. to the DJJ is vacated, and the case is remanded for a new disposition hearing.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Kevin J. McGee, Judge

Superior Court County of Ventura

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